FILE COPY

Office Supreme Court, U. S.
FILED
APR 19 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

October Term, 1927

19

No. ~~685~~ 41

NORTHERN COAL & DOCK COMPANY and GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

*Petitioners,*

*vs.*

EMMA STRAND, and INDUSTRIAL COMMISSION OF WISCONSIN,

*Respondents.*

*Certiorari to the Supreme Court of the State of Wisconsin.*

## BRIEF OF RESPONDENT, EMMA STRAND

JOHN A. CADIGAN
PETER B. CADIGAN
ANDREW NELSON

*Attorneys for Respondent, Emma Strand*

## INDEX


| | Page |
|---|---|
| Statement of Fact | 2 |
| Errors Assigned | 3 |
| Argument | 4 |


## CITATIONS


| | |
|---|---|
| Constitution: Article III, Section 2, of Constitution of United States | 1 |


## LEGISLATION CITED


| | |
|---|---|
| Act of March 30, 1920, 41 Stats. L. c. 111, p. 537, U. S. Comp. St. Sec. 1251½-f | 5 |
| Jones Act (Act of June 5, 1920), 41 Stats. L. 1007 | 5, 7 |
| Workmen's Compensation Act—Chap. 102 of Wisconsin Statutes | 4 |
| Wisconsin Death Statute (Sec. 331.03, Wisconsin Revised Statutes) | 4 |


## CASES CITED


| | |
|---|---|
| Bloom v. Furness-Withy & Co., 293 Fed. Rep. 98 | 5 |
| Dobrin v. Mallory S. S. Co., 298 Fed. Rep. 349 | 5 |
| Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171, 45 Sup. Ct. 39 | 9 |
| Grant Smith-Porter Ship Company v. Rohde, 257 U. S. 469, 42 Sup. Ct. 157 | 7, 8 |
| Great Lakes Dredge & Dock Co. vs. Kierejewski, 261, U. S. 479, 43 Sup. Ct. 418 | 9 |
| International Stevedoring Co. v. Haverty, 47 Sup. Ct. 19 | 5 |
| Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438 | 9 |

Page

Leathers v. Blessing, 105 U. S. 626, 630; 26 L. Ed. 1192 11
Millers' Indemnity Underwriters v. Braud, 270 U. S. 59, 46 Sup. Ct. 194 ..... 7, 11

Martin v. West, 222 U. S. 191, 197; 32 Sup. Ct. 42..... 11
Northern Coal & Dock Company v. Industrial Commission, 193 Wis. 515; 213 N. W. 658 ..... 1, 7

R. R. Co. v. Towboat Co., 23 How. 209, 215; 16 L. Ed. 433 ..... 10

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449, 45 Sup. Ct. 157 ..... 11

Smith T. & Son Inc. v. Fannie Robinson Taylor, —— U. S. ——; 48 Sup. Ct. Rep. 228 (Advance opinions, March 1, 1928 ..... 10

Southern Pacific Company v. Jensen, 244 U. S. 205; 37 Sup. Ct. 524 ..... 9, 10

State of Washington v. W. C. Dawson Co., 264 U. S. 219, 44 Sup. Ct. 302 ..... 10

The Harrisburg, 119 U. S. 199 ..... 5

The Plymouth, 3 Wall. 20, 33; 18 L. Ed. 125..... 11

The Propeller Commerce, 1 Black 574, 579; 17 L. Ed. 107 11

Waring, et al vs. Clarke, 5 How 441, 459; 12 L. Ed. 226 10
Western Fuel Co. v. Garcia, 257 U. S. 233; 57 Sup. Ct. 89 ..... 5, 11

IN THE

# Supreme Court of the United States

October Term, 1927

---

No. 685

---

NORTHERN COAL & DOCK COMPANY and GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

*Petitioners,*

*vs.*

EMMA STRAND, and INDUSTRIAL COMMISSION OF WISCONSIN,

*Respondents.*

---

*Certiorari to the Supreme Court of the State of Wisconsin.*

---

## BRIEF OF RESPONDENT, EMMA STRAND.

---

This case is before this court on Writ of Certiorari issued to the Supreme Court of the State of Wisconsin, to reverse the decision of that court as found in Northern Coal & Dock Company vs. Industrial Commission, 193, Wis. 515; 213 N. W. 658 (Rec. 55).

It is claimed by petitioners that jurisdiction is conferred by Article III, Section 2, of the Constitution of the United States, extending exclusively the Federal judicial power to all cases of admiralty and martime jurisdiction. It is claimed by petitioners that the decision of the Supreme Court of Wisconsin which, in turn, affirmed the decision of the Circuit Court of Dane

County, Wisconsin, holding that in this case the Industrial Commission of Wisconsin had power to make an award in favor of respondent, the widow of the employee, who was killed while working in the hold of a vessel in navigable waters on Lake Superior, is in error.

## STATEMENT OF FACTS

The facts in this case are not in dispute, but we deem the statement of fact set forth in petitioners' brief inadequate and incomplete fairly to represent the question involved in the case.

The respondent, Northern Coal & Dock Company, had its principal office at Cleveland, Ohio, and at the time of the death of deceased, was engaged in mining, handling and selling coal at wholesale. The company does not own any vessels or railroad lines. It maintains a dock situated on Superior Bay, in the city of Superior, which bay is a navigable portion of the Great Lakes, and all coal received at the dock is brought by boat from lower lake ports (Rec. 31, 32).

On October 20, 1924, the deceased, Charles Strand, was in the employ of this company (Rec. 28, 29). He was carried on the payroll of the company as a car loader, which occupation was carried out on the dock, but the general nature of his work required him occasionally to assist in the unloading of boats (Rec. 38). He was steadily employed by the company (Rec. 39). The company did not employ any class of employees who did nothing except stevedore work (Rec. 40). The regular employees on the dock were called upon at such times as boats were being unloaded, to go into the hold of boats and clean up coal therein and shovel it out where it could be taken out with a clam shell operated by machinery (Rec. 41). He was so engaged on October 20, 1924, when the clam shell struck him and squeezed him against the side of the boat, causing his instant death (Rec. 37, 39). The vessel on which he was working at the time of his death was the Steamer Matthew Andrews, which brought a cargo of coal from Toledo, Ohio, to Superior by way of the Great Lakes (Rec. 37, 42). It was lying in navigable waters and was secured to the dock by lines in the customary manner while it was being unloaded (Rec. 31). The

company had an average of about five boats a month during the navigation season and it took about 15½ hours to unload a boat of the average size, so that there was approximately 75 hours work each month in unloading boats at the dock (Rec. 41), and the balance of the time the employees were engaged in work on or about the dock. During the period from about December 1st to April 15th, navigation is closed, and no boats are unloaded (Rec. 41). In the open season of 1924, that is, from approximately April 1st to October 20, 1924, the date on which Strand met his death, he worked 117½ hours on 31 boats, the balance of his time having been spent on the dock (Rec. 34).

The respondent, Emma Strand, is the widow of the deceased and, if the Workmen's Compensation Law of Wisconsin is applicable to the facts of the case, she is entitled to compensation in the sum of $5600.00, plus $200.00 burial expenses, or a total of $5800.00, which amount was awarded her by an award of the Industrial Commission of Wisconsin (Rec. 18). Subsequent to the entry of the award as stated, the Northern Coal & Dock Company, herinafter referred to as employer, and its insurance carrier, brought an action pursuant to the laws of the State of Wisconsin, to review this award. The action resulted in judgment affirming the award. Thereupon, the said judgment was appealed from to the Supreme Court of the State of Wisconsin, on the ground that the Industrial Commission of Wisconsin had no jurisdiction to enter the award, which appeal resulted in judgment affirming the award.

## ERRORS

The only error claimed, is that the Supreme Court of Wisconsin erred in not reversing the judgment of the Circuit Court of Dane County affirming the award.

## ARGUMENT

It may be conceded at the outset as stated in petitioners' brief, that this court has established that states have no power to change, modify or affect the general maritime law. A review

of all of the cases dealing with the subject set forth in petitioners brief will indicate that each case stands on its own bottom, and the decision therein rests upon the specific facts involved. This being the fact, it is the contention of the respondent, Emma Strand, that the decision of the Wisconsin Supreme Court rendered herein is right, and ought to be upheld.

The majority opinion of the Supreme Court of Wisconsin, (Rec. P. 55) is put squarely upon the ground that there was no question of maritime tort involved, as the matter was understood at common law, for the reason that there was no liability in admiralty for death, and, since Strand was instantly killed, his widow must necessarily avail herself of the remedy provided by the laws of the State of Wisconsin, which remedy is that provided by Sec. 331.03 of the Wisconsin Statutes, which follows:

> "331.03 RECOVERY FOR DEATH BY WRONGFUL ACT
>
> "Whenever the death of a person shall be caused by wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided that such action shall be brought for a death caused in this state."

but that since this section was abrogated as between employer and employee by the terms of Sec. 102.03, Chap. 102, Wisconsin Statutes, 1925, which follows:

> "102.02 (3) * * * And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of Section 102.03 to 102.34 inclusive, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death * * * "

the Industrial Commission was the sole tribunal in which proceedings to enforce liability might be brought.

*The Harrisburg, 119 U. S. 199*
*Bloom v. Furness-Withy & Co. 293 Fed. Rep. 98.*
*Dobrin v. Mallory S. S. Co. 298 Fed. Rep. 349*
*Western Fuel Co. v. Garcia, 257 U. S. 233,*

The majority opinion of the Supreme Court of Wisconsin refers to the Act of Congress of March 30, 1920 (41 Stats. L. c 111, page 537; U. S. Comp. Stat. Sec. 1251½-f) which provides as follows:

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act, nor shall this act apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal Zone."

construing that section as not affording any remedy in admiralty where the location of the tort was on the Great Lakes.

The majority opinion did not cite or discuss the Jones Act of June 5, 1920 (Act of Congress June 5, 1920, 41 Stats. L. 1007), extending the provisions of the Federal Employers Liability Act to seamen.

It is contended by petitioners, that the Jones Act applies to this case under the decision of *International Stevedoring Company v. Haverty, 47 Sup. Ct. Rept. 19,* in which this court held that the word "seaman" was a broad and inclusive term and included "stevedores" for the reason that the work performed by stevedores was formerly performed by the ship's crew.

The opinion of this court in the Haverty case was not handed down until October 18, 1926, so the respondent, Emma Strand did not have the benefit of the interpretation just referred to. However, there was a specified finding in the Haverty case that the employee therein involved who was injured while engaged in stowing freight in the hold of a boat was a longshoreman or stevedore. He was an employee of a stevedore company, whose

business was to unload boats, and thus perform a maritime service formerly rendered by the ship's crew.

Under the facts in the instant case, to stretch the word "seamen" as used in the Jones Act to cover the employment of the deceased in the instant case, would, we contend, stretch the law to the breaking point, as the record shows that deceased was not in any sense a stevedore or longshoreman, but was an employee of a company whose business was mining, marketing and selling of coal at wholesale. The record shows that the unloading of boats, and the casual work of the deceased on the same, was but incidental to the main business of the company. The company owned no boats, unloaded no boats for profit, and there is not the slightest evidence in the record to show that the deceased was engaged in the fulfillment of a maritime contract at the time of his death. We presume that if Mr. Strand were alive, he would be the most suprised man in the world to learn that at the time he was injured, he was a seaman.

There is no question but what the location of the tort in the instant case was maritime, but this fact alone does not give the admiralty courts exclusive jurisdiction. There are other things to take into consideration besides the locality of the tort; the nature of the employment itself is one; the question of whether or not the injured party was engaged in maritime work is another; the question of whether or not the nature of the contract of employment was such that it must be inferred that the parties to the contract of employment contracted with reference to the operation of the maritime law, and further question is often presented, as to whether or not the particular state law or statute under which relief has been granted was of such force or effect as to interfere in any way with the uniformity of the maritime law.

An employe of a building company at work upon a vessel which had been launched so as to be within the admiralty jurisdiction but who had contracted with his employer with reference to a state compensation law, was held to be entitled to compensation for injury under that law, and that that remedy

was exclusive. The location of the tort was maritime, but the contract for construction of the boat was non-maritime.

*Grant Smith-Porter Ship Company v. Rohde, 257 U. S. 469; 42 Sup. Ct. 157.*

Again in the case of *Millers' Indemnity Company v. Braud 270 U. S. 59, 46 Sup. Ct. 194*, it was held that the Workmen's Compensation Law of Texas applied to an employee engaged in removing obstructions to navigation in navigable waters within the state. In that case the deceased was employed as a diver and submerged himself from a floating barge anchored in a navigable river for the purpose of sawing off timbers which obstructed navigation, and while thus submerged, he died of suffocation. The decision went on the ground that no material prejudice was occasioned to the general rules of maritime law by applying to the facts in the case the provisions of the Workmen's Compensation Law of Texas. The court held that the remedy provided by the Texas law under the circumstances was exclusive.

We therefore respectfully submit that under the facts in the instant case, in order to work a reversal of the judgment of the Supreme Court of the State of Wisconsin herein, this court must find that at the time of his death, the deceased was a seaman, within terms of the Jones Act, (Act of Congress of June 5, 1920).

Aside from the ground asserted in the majority opinion of the Supreme Court of Wisconsin for affirming the award of the Industrial Commission in the instant case, it is the contention of the respondent that the same may also be upheld on the ground set forth by Stevens J. in his concurring opinion to be found at page 519 of 193 Wis. (Page 658 of 213 N. W.).

The ground upon which Stevens J. concurs in the affirmation of the award of the Industrial Commission in the instant case may be briefly stated as follows:

Respondent, Emma Strand, widow of deceased, makes no claim against the ship or the owner of the ship, and seeks no recovery in tort. On the contrary, she asks that the employer, Northern Coal & Dock Company, pay her the death benefit

which it contracted to pay when it employed the deceased. He holds that the deceased was not employed by the owner of the ship, or as a seaman or a stevedore, and that the single question presented, is whether the fact that deceased was temporarily at work on board a ship lying in navigable waters vests exclusive jurisdiction in admiralty to such an extent as to nullify the contract of employment and to give the employer the right to violate the obligation of that contract, which gave the widow the right to a death benefit under the Wisconsin Workmen's Cnmpensation Act. He holds the controlling fact in the case to be that the application for compensation presented to the Industrial Commission of Wisconsin is not an action sounding in tort; that on the contrary it is a proceeding to recover a death benefit fixed by contract "within a state whose positive enactment prescribed an exclusive remedy therefor, and as both parties had accepted and proceeded under the statute, . . . it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime *v. Rhode, 257 U. S. 469, 42 Sup. Ct. 157.* ~~He further points I. Rohde, 257 U. S. 469, 42 Sup. Ct. 157.~~ He further points out, as we have previously contended, that the fact that deceased sustained an injury on board ship, does not give admiralty exclusive jurisdiction, and that the location of the maritime tort causing the injury or death is not the controlling factor, and by a process of *reductio ad absurdum* shows that, if the contention of petitioners herein be correct, a delivery boy who was injured on board ship during the short space of time essential to secure on the ship a single package of freight consigned to his employer, could have recourse for damages only in an admiralty court.

The petitioners claim that to apply the Workmen's Compensation Act of Wisconsin to the instant case, would clearly work material prejudice to the characteristic features of the general maritime law, and would interfere with the proper harmony and uniformity of that law. This statement appears to be quite gratuitous for the reason that they fail to point out in what manner the application of the local compensation act to the facts involved here will interfere with such uniformity. We submit that no claim has been asserted in the instant case that would in any way interfere with such uniformity.

Petitioners also submit that the facts in the instant case are controlled by the case of *Southern Pacific Company v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524.* We submit that such is not the case for the reason, as pointed out by Judge Stevens in his concurring opinion that, "What is there said must be read in the light of the fact that the law there under consideration subjected the owners of ocean-going vessels of other states who employed seamen and stevedores to move the ship's cargo to the obligations imposed by the New York Workmen's Compensation Act." In the *Jensen* case, the deceased was killed on a steamship owned by his employer, the Southern Pacific Company. The work being done in that case by deceased was clearly the work of a stevedore engaged in the fulfillment of a maritime contract, and the injury from wihch he died, was likewise maritime. It is very clear that to apply the provisions of the Workmen's Compensation Act of New York to the facts in the *Jensen* case would destroy the desirable uniformity in respect to maritime matters which the Constitution was designed to establish.

We propose now briefly to review some of the authorities cited in petitioners' brief as supporting its contentions.

In the case of *Great Lakes Dredge & Dock v. Kierejewski, 261, U. S. 479, 43 Sup. Ct. 418,* the libelant, the widow of deceased, who was a boiler maker, was making repairs on a scow moored in navigable waters when he met his death through the negligence of the Dredge & Dock Company, a tug belonging to the said company swamping the float upon which he was standing. This is clearly a case of admiralty jurisdiction, with no conflict of the state laws involved.

The case of *Gonsalves v. Morse Dry Dock & Repair Company, 266 U. S. 171, 45 Sup. Ct. 39,* is a case involving a libel against an employer for injuries sustained in repairing a steamer supported by a floating dry dock. This case was held to be one for admiralty jurisdiction, the action not having occured on land, and there was no conflict with a state statute involved.

The case of *Knickerbocker Ice Company v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438,* was one where the deceased was employed as a barge man, and was doing work of a maritime nature when he fell into the Hudson River and was drowned. His

widow made a claim under the Workmen's Compensation Law of New York and an award was granted and sustained by the highest state court, which latter court concluded that the rule set out in the *Southern Pacific Company v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086* had been extinguished by an act of Congress amending the judicial code relating to the jurisdiction of District Courts so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any state. The nature of the tort there was, of course, purely maritime, both as to location, nature of work, and contract, and the court held that Congress by amending the judicial code as stated, had undertaken to permit application of Workmen's Compensation Laws of the several states to injuries *within the admiralty and maritime jurisdiction.* In view of the decision in the *Southern Pacific Company v. Jensen supra,* the court held that Congress could not transfer its legislative power to the states, and set aside the award. The state enactment in that case provided exclusive rights and liabilities and undertook to secure their observance by heavy penalties and onerous conditions and provided novel remedies incapable of enforcement by an admiralty court, to a state of facts which clearly showed a case for exclusive admiralty jurisdiction. The decision was five to four, four judges dissenting.

*State of Washington v. W. C. Dawson, 264 U. S. 219, 44 Sup. Ct. 302,* involves a case of the death of a workman who was killed while actually engaged in maritime work under a maritime contract. He was engaged in the business of a stevedore, and the company for whom he worked and its employees worked only on board ships in navigable waters.

The excerpt from the opinion of this court in the case of *T. Smith & Son Inc. v. Fannie Robinson Taylor, ..... U. S. ....., 48 Sup. Ct. Rep. 228 (Advance opinions March 1, 1928),* to be found on page 8 of petitioners' brief, is mere *obiter dicta* for the reason that the case does not involve admiralty jurisdiction, since the deceased met his death while on land, and the Louisiana Compensation Law was clearly applicable.

The cases of *Waring, et al v. Clarke, 5 How. 441, 459; 12 L. Ed. 226; R. R. Co. v. Towboat Co. 23 How. 209, 215; 16*

*L. Ed. 433; The Propeller Commerce, 1 Black 574, 579; 17 L. Ed. 107; ..The Plymouth, 3 Wall. 20, 33; 18 L. Ed. 125; Leathers v. Blessing 105 U. S. 626, 630; 26 L. Ed. 1192; Martin v. West, 222 U. S. 191, 197; 32 Sup. Ct. 42,* are incorrectly cited in petitioners' brief as authorities for the proposition that admiralty jurisdiction in tort matters depends upon locality. We say this advisedly, having in mind the decision rendered by this court in the case of *Millers' Indemnity Underwriters v. Braud, 270 U. S. 59, 46 Sup. Ct. 194* heretofore discussed in this brief. No one denies that the locality of the tort is an *element* in admiralty jurisdiction.

In *Robins Dry Dock & Repair Company. v. Dahl, 266 U. S. 449, 45 Sup. Ct. 157,* the decision was simply to the effect that a person who is doing repair work on a vessel in navigable waters is amenable to the admiralty jurisdiction to the extent that it was error for the trial court to permit the jury to consider the local law of the State of New York in deciding whether or not the employer was negligent.

In the case of *Western Fuel Co. v. Garcia, 257 U. S. 233, 57 Sup. Ct. 89,* also cited in petitioners' brief as authority for its contention, we respectfully sumit that the exact question involved in the instant case was not decided in the *Garcia* case as alleged in petitioner's brief. The decision in the *Garcia* case went on the theory that deceased was a stevedore and also worked in the hold of a vessel at the timeof his death, obviously in the fulfillment of a maritime contract. The question of the conflict between the California Workmen's Compensation Act and admiralty jurisdiction was not involved. The court simply holds that under the circumstances stated, where such tort occurs within a state, whose statutes give a right of action for death by wrongful act, admiralty courts will entertain a libel in personam for the damages sustained by those to whom the right is given, since the subject is maritime and local in character, and a modification to the rule applied when following the common law of admiralty which does not materially prejudice the characteristic features of that law, nor interfere with its uniformity.

In view of the above and foregoing, we therefore respectfully submit that the decision of the Supreme Court of the state

of Wisconsin, affirming the judgment of the Circuit Court of Dane County, Wisconsin, which latter judgment upheld the award of the Industrial Commission, granting respondent, Emma Strand, compensation in the amount stated herein, is right, and should be affirmed.

Respectfully submitted,

JOHN A. CADIGAN
PETER B. CADIGAN
ANDREW NELSON

*Attorneys for Respondent, Emma Strand*